Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term , 1994

GORDON FITZGERALD ,
STATUTORY TRUSTEE LIQUIDATOR OF
PHOENIX SYSTEMS INTERNATIONAL, INC.
Petitioner

v.

ALAN P. BAYHAM JR., 'ET AL',
Respondents

On Petition for Writ of Certiorari
To The Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

The unanimous opinion in Re. Ellis , 53 Hawaii, 23 p.2d 286 (1971), cert denied, 405 U.S., 1075,92 S.Ct.1500, 31 L.Ed2d 809(1972) reafirmed in Oahu Plumbing & Sheet metal v. Kona Const. Hawaii 590 P.2d 575 was that basic requisites of 'due process' based on 28 U.S. C. A.§ 1654; Const. Art. 5 § 6, guarantee that where property rights may be affected, notice and an opportunity to be heard must be afforded to all interested persons and public policy (because of the Constitutional dilemma presented) dictated that an exception be made to the prohibition against one engaging in the unauthorized practice of law representing a corporation in the limited situation where the statutory trustee liquidator of a dissolved insolvent corporation makes a showing that corporate funds are unavailable for the hiring of counsel and that to insure those with property rights of their day in court a statutory trustee liquidator could continue pro se to represent the dissolved insolvent corporation.The questions presented in this action therefore are ;

1. WHETHER any federal or state court can, by a rule of court, deny a dissolved insolvent corporations statutory liquidator trustee's fiduciary duty,Constitutional due process right to act pro se to protect and or prosecute company property or other claims including legal malpractice claims.

2. WHETHER corporate legal malpractice, fraud claims against a former corporate outside attorney are considered a 'property' of a dissolved insolvent corporation.

Gordon Fitzgerald, Statutory Trustee Liquidator of Phoenix Systems International, Inc. (PSI) ,

Petitioner

v.

Alan P. Bayham Jr. and Deborah Bayham, husband and wife;
Robert Beucler and Jane Doe Beucler, husband and wife
William Brown and Jane Doe Brown, husband and wife
William Reckling and Jane Doe Reckling, husband and wife,
Bayham& Beucler P.C.,lawyers,an Arizona Corporation;
Bayham , Beucler, Reckling & Brown, P.C. Lawyers,
an Arizona Corporation

Respondents

Rule 29.1 Statement :

Phoenix Systems International, Inc., was at all times relevant an Arizona Corporation, and / or dissolved /insolvent corporation with no other affiliates, engaged in interstate commerce and licensed to do business in the state of Arizona.

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION..... 1
STATUTORY PROVISIONS INVOLVED..... 2
STATEMENT OF THE CASE..... ... 2
A. Results of Respondent s Legal Malpractice fraud 2
B. Trustee Fitzgerald Search For Lawyer For PSI..... 4
C. Fitzgerald Pro Se, as Liquidator Trustee of PSI Entered Derivative Law Suit 9
D. BAR Found Bayham Guilty Of Malpractice 11
E. Critical Information BAR Aware Of / Ignored 13
REASONS FOR GRANTING PETITION 14

- I. A Constitutional Conflict Exists Between Hawaii /Arizona Supreme Courts re; unique Court Rule exception To Allow Corporate TrusteeTo Act Pro Se To Protect Legal Malpractice Claims Of A Disolved/Insolvent Corporation... 14
- II. To Not Allow An Exception is Not In The Public Interest 15
- III. Conflict exists between Illinois /Arizona Supreme courts : Re Legal Malpractice Claims Are A 'Property' Of A Dissolved, Insolvent Company 18

CONCLUSION 18
APPENDIX

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Cohen v. Beneficial Indus. Loan Corp., N. J., 69 S.Ct 1221 , 337 U.S. 541, 93 L.Ed. 1528..... 9

Re. Ellis ,53 Hawaii, 23 p.2d 286 (1971),cert denied, 40 U.S 1075, 92 S.Ct.1500,31 L.Ed 2d 809(1972) i,4,7,11,15,16

Helvering v. South Penn Oil Co., 68 F. 2d 420, 62 App. D.C. 373..... 11

Heiskell v. Mozie,65 App.D.C. 255,82 F.2d 861, 863 (1936).6

Illinois Power & Light Corp. v Hurley, C.C.A. Mo., 49 F .2d 681, certiorari denied, 52 S. Ct. 19 284 U.S. 637, 76 L. Ed 541 3

McClean v. Bradley, 282 F. 1011 (N.D.Ohio 1922) aff'd 299 F.2d 379 (6th cir 1924) cert denied 266 U.S. 619, 45 S. Ct 98, 69 L. Ed 471 (1924) 7

Osborn v. United States, 9 Wheat 738 22 U.S. 738 829, 6 LEd. 204 (1824); 5

Price v. Johnston 159 F.2d 234 (9th cir. 1947) cert. granted 331 U.S. 804, 67 S.Ct 1757, 91 L.Ed 1826 (1947) 5

United States v Krueger, 121 F.2d 842, 844 (3rd Cir. 1941 4

Willheim v. Murchision, 206 F. Supp. 733 (S.D.N.Y. 1962) appeal dismissed, 312 D.2d 399 (2nd Cir. 1964) 6

STATE CASES

Americus v. McGinnis, 128 Wash. 28,30, 221 P. 987,988 (1924) 5

Amfac Distribution Corp. v. Miller 138 Ariz. 152 (1983) at (2,3)..... 14

Arthaud v. Griffin, 202 Iowa 462, 464, 210 N.W. 540, 541 (1926).5

Blake v. Portsmouth & Concord R. Co., 39 N.H. 435 11

Clark Estate Co. v. Gentry 362 Mo. 80,91 240 S.W. 2d124,130 (1951). 6

DeBoer v. Brown, 138 Ariz. 168 673 P.2d 912 (1983)..... 14

Ellis v. Crockett, 51 Haw. 45, 61,451 P.2d 814, 824 (1969)..... 5

Hightower v. Hawthorn, 12 F. Cas. p. 142 (No 64,780) (Sup Ct. Ark. 1826) 5

Jones v. Peck, 63, Cal.App.397,401-402, 218 P. 1030, 1032 (1923) *Id* at 420,218 P.1030. 4

Jones v. Siesennop, 371 N.E. 2d 895 (1977)..... 7

Jenkins v. First Baptist Church of Scottsdale 166 Ariz. 243 , 801 p.2d 478 , (App 1990) Rev. Denied 10

In King v. Maricopa Superior Court (1983) Ariz. 147, 673 P.2d 787(1993),..... 10

King v. Coosa Valley Mineral Products Co. 283 Ala (1972) 15 So .2d 275 (1968) McDaniel 34 Ill .2d at 492, 216 N.E. 2d 140. 7

McDaniel 34 Ill .2d at 492, 216 N.E. 2d 140. 8

Megael Col V. Pierson, 99 N.J.Eq. 436, 132 A. 78 (1926) 7

Oahu Plumbing & Sheet metal v. Kona Const. Hawaii 590 P.2d 575 i

Mortensen v. Empt Ret. Syst. Trustees, 52 Haw 212, 219-221, 473 P.2d 866, 871-872 (1970) 6

Nudelman v. Thimbles 40 S.W. .2d 475, 225 Mo. App 553..... 3

Rossi v. Caire 186 Cal. 544,549 199 P.1042 (`92`) 3,4,5

Saltmarsh v. Planters' & Merchants Bank, 17 Ala. 761 3

Territory v. Jennie L. Aona et al, 43 Haw 253, 255 (1959)..... 6

United Bank of Arizona v. Sun Valley Door
149 Ariz. 64 App at 66/68 P.2d (App. 1986)..... 3
Weinacht v. Bower, 140 Or. 527, 533, 14 P.2d 622,625 (1932) .. . 6
Wright v. Williams, 121 Cal Rptr 194 (1975) 14

STATUTES & RULES

U.S. Const. Art. 5 § 6§ 14 ..... .i ,2
28 U.S.C.A §1257 (a)(3) 1, 2
28 U.S.C.A. 1654 2,5
11 U.S.C. § 541, 117 U.S.C. §541 15
Judiciary Act of 1789 §35, 1 stat. 73, 92 5
A. R. S. Const. Art. 6, § 5. 2,10
A.R.S. § 12-109 A 2, 9
ARS §§§10-087, 10-103, 10-105 3,7
ARS. §42-1301, et. seq.ARS §43-1151 2

MISC.

7A C.J.S. § 167 Attorney & Client 28 4,16
18 CJS § 397 Corporations Pg. . 734 9
18 CJS § 398 Corporations Pg . 736 9
19 C.J.S. Corporations § 864 at 519/520 (b) Powers 3
19 C.J.S. CORPORATIONS § 859 at 514 Effect on Torts 3
ABA/BNA lawyers manual on Professional conduct
301:131.106 Negligence And Breach Of Contract, ...14
Arizona Bar Hearing Committee Findings Of Fact, Conclusions
Of Law And Recommendations (October 7, 1994) 12
Richard K. Burke, professor law, University of Arkansas,
Little Rock, 1984 law review article"..... 15
W. Fletcher, 16A Cyclopedia of Corporations §8178, p. 415
(perm ed. rev. vol. 1962)..... 4

IN THE
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October Term 1994

Gordon Fitzgerald , Statutory Trustee Liquidator of
Phoenix Systems International, Inc. ,
Petitioner

v.

Alan P. Bayham Jr., et al,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

Phoenix Systems International, Inc. (PSI) through its statutory liquidator trustee Gordon Fitzgerald, respectfully petitions for a writ of certiorari to review Arizona's Supreme Court September 22, 1994 order denying review of Arizona's Appeal court December 22, 1993 order that dismissed Petitioner's appeal.

OPINIONS BELOW

November 3, 1992 Superior Court, dismissed saying no exceptional circumstances existed to warrant PSI trustee Fitzgerald to act pro se. December 22, 1993 Arizona Appeal Court dismissed on the basis non attorneys can not appear in Arizona for a corporation. September 22, 1994 Arizona's Supreme Court denied review. October 7, 1994 Arizona Bar Disciplinary Hearing Committee found Respondent Bayham guilty of legal malpractice.

JURISDICTION

Review of Arizona Supreme Court Order of September 22,1994.Jurisdiction of this court is invoked under 28 U.S.C.§ 1257(a)(3)

STATUTORY & CONSTITUTIONAL PROVISIONS

United States Constitution, Art 5, 6 & 14 guarantees of property and due process rights, 28 U.S.C.A §1257 (a)(3), 28 U.S.C.A 1654. Arizona Const. Articles VI § 5; Arizona statutes A.R.S.§12-109 Court rules shall not abridge, enlarge or modify substantive rights of a litigant;ARS. §§ 42-1301, et. seq., 43-1151 requirements for dissolving a corporation and A.R.S.§§10-087,10-105 Survival of Remedy After Dissolution Statutes.

STATEMENT OF THE CASE

Fitzgerald,stockholder,director,Chief Executive Officer of PSI, hired Respondent lawyers to represent PSI in the underlying law suit. Alan Bayham Jr. represented the law firm as specialists in corporate litigation. PSI operated in interstate commerce under ARS §10-092 rules until December 1992 when Respondent lawyers abandoned PSI in the middle of litigation in favor of another client (unknown to Fitzgerald at the time) directly causing PSI's demise.

A.Result Of Respondent Lawyers Malpractice, Fraud

Between December 1991 and August 27, 1992 PSI was in a state of defacto dissolution / insolvency conducting no business except to settle its affairs. Arizona's Corporation Commission on August 27, 1992 confirmed PSI intent to dissolve. On September 16 , 1992 the Arizona Department of Revenue notified the Corporation Commission PSI met dissolution requirements of ARS §§42-1301, 43-1151. Fitzgerald by A.R.S. §10-087, 10-105 Arizona Survival of Remedy of stockholder, the Director / Trustee Liquidator of PSI.[1]

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[1]ARS §10-087(A)3, "The corporation shall proceed to collect its cash, convey and dispose such of its properties as are not to be distributed in kind to its shareholder, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its assets and business..."A,R,S,§10-105 "The dissolution of a corporation ... shall not

Fitzgerald's Trustee fiduciary legal duty demanded he collect PSI legal malpractice, fraud,AZRICO fraud property claims against Respondent lawyers.[2] As a direct result of Respondents malpractice fraud acts PSI had no

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take away or impair any remedy available to or against such corporation, its directors, officers or shareholders, or any right or claim existing,or any liability incurred prior to such dissolution"; United Bank of Arizona v. Sun Valley Door; 149 Ariz. 64 App at 66/68 P.2d (App. 1986);" there exists an implicit nexus between ARS§§10-087(A)3,10-105; corporation directors ... may employ any reasonable remedy to facilitate the limited statutory purpose during the winding up process"; 19 C.J.S. CORPORATIONS § 864 at 519/520 (b) Powers:"The trustees are endowed with all the functions necessary to protect the interests of the dissolved corporation, and to continue such corporation for all purposes, except the transaction of new business.";"The duties of trustees for winding up are measured by their powers and by the principles of law and equity applicable thereto." See Illinois Power & Light Corp. v Hurley, C.C.A. Mo., 49 F .2d 681, certiorari denied, 52 S. Ct. 19 284 U.S. 637, 76 L. Ed 541.Also see Saltmarsh v. Planters' & Merchants Bank,17 Ala. 761and Rossi v. Caire,161 P. 1161 174 C. 74.

[2]19 C.J.S. CORPORATIONS § 864 at 519/520 (b) Powers "The trustees are endowed with all the functions necessary to protect the interests of the dissolved corporation, and to continue such corporation for all purposes, except the transaction of new business."... "The duties of trustees for winding up are measured by their powers and by the principles of law and equity applicable thereto. See Illinois Power & Light Corp.v. Hurley, C.C.A. Mo., 49 F .2d 681, certiorari denied, 52 S. Ct. 19 284 U.S. 637, 76 L. Ed 541 also see Saltmarsh v. Planters' & Merchants Bank, 17 Ala. 761 see also Rossi v. Caire, 161 P. 1161 174 C. 74; 19 C.J.S. CORPORATIONS § 859 at 514 Effect on Torts "A corporation or those representing it have been held liable even after a dissolution for torts committed prior to dissolution" See Nudelman v. Thimbles 40 S.W. .2d 475, 225 Mo. App 553 ...19 C.J.S. CORPORATIONS § 853 at 508 Liability for breach of contract..."The corporations right of action for damages for a breach by the other party may be enforced by its former stockholders or by others succedding to its property and rights" See Smyth v. Kenwood Land Co., 190 P. 962 97 Or. 19.

funds to hire a lawyer. PSI stockholders wished PSI to settle its claims against Respondents and reactivate PSI.

B. Trustee Fitzgerald Search for a lawyer For PSI

Fitzgerald was given a list of malpractice lawyers to contact. No one would take the case citing: PSI is insolvent so fee payment was not assured; Respondent Bayham's sister is a superior court commissioner; Bayham is a member of an old Arizona legal family; I know his father; his firm sends us business;he is a friend;I represent his malpractice insurance company etc. It became obvious no lawyer would represent PSI, Fitzgerald independently found 7A C.J.S.§ 167 Attorney & Client; "In a limited situation where a statutory liquidator of a dissolved corporation, not an attorney in the state, makes a showing that corporate funds are unavailable for hiring of counsel, he may perform the necessary legal services."; and Hawaii Supreme Court's unanimous decision in ELLIS supra. Fitzgerald, (to act pro se) adapted Hawaii Justices reasoning re; PSI trustee's Constitutional rights towit :

A more accurate characterization for a former director is that of "statutory liquidator" [3] His function is simply to liquidate the assets possessed as expeditiously as sound business judgment permits [4]. "The word "title" in this context is loosely used. The property of a dissolved corporation actually belongs to those persons who were stockholders at the time of its dissolution but the right to possession passes to the former directors at the time of its dissolution by force of the statutory provision making them statutory liquidators to settle the corporate affairs.[5]

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[3] *Id in Ellis @ 289.* ..United States v Krueger, 121 F.2d 842, 844 (3rd Cir. 1941 *see also* Rossi v. Caire 186 Cal. 544, 199 P.1042 (`92`) applying the phrase "trustee in liquidation" at 549.

[4] W. Fletcher, 16A Cyclopedia of Corporations §8178, p. 415 (perm ed. rev. vol. 1962)

[5] Jones v. Peck, 63, Cal.App.397,401-402, 218 P. 1030, 1032 (1923) *Id* at

In substance therefore, Fitzgerald as statutory liquidator possesses the property of the former stockholders of PSI with the power to dispose of so much thereof as is necessary to pay creditors who have a lien upon it and/ or prosecute property /other claims for PSI.[6] Arizona statute's import mirrors that of an early federal law [7] In matters relating to the conduct of business before our courts the construction of a counter part federal provision [8]is highly persuasive.Federal pronouncements on 28 U.S.C.A. §1654, supra are helpful in constructing the right asserted. Clearly by statute or otherwise this right of self-representation is available to a person in civil proceeding [9] but regardless of the right's deviation or the proceeding where it is invoked, the question is whether one seeking to represent himself pro se is a person who by the substantive law has the right sought to be enforced. Put differently, is Fitzgerald in conducting the litigation, the real party in interest ?

420,218 P.1030.

[6] *id* See Rossi v. Caire supra 186 Cal at 552-553, 199 P. at 1046 where in discussing the subject of "title" the court states that ...(assuming) legal title to the property had solely vested in the trustees designated by the statute ...subject to ...the payment of creditors, the former stockholders were the sole beneficiaries and the absolute owners in equity of the property "

[7] Judiciary Act of 1789§35, 1 stat. 73, 92 (1789)provided "in all courts of the United States, the parties may plead and manage their own causes personally..." This identical language is now found in 28 U.S.C.A. 1654

[8]Ellis v. Crockett, 51 Haw. 45, 61,451 P.2d 814, 824 (1969).

[9] Price v. Johnston 159 F.2d 234 (9th cir. 1947) cert. granted 331 U.S. 804, 67 S.Ct 1757, 91 L.Ed 1826 (1947) Apart from statute the right is rooted in the common law. *See following federal and state civil cases* : Osborn v. United States, 9 Wheat 738 22 U.S. 738 829, 6 LEd. 204 (1824); Hightower v. Hawthorn, 12 F. Cas. p. 142 (No 64,780) (Sup Ct. Ark. 1826); Arthaud v. Griffin, 202 Iowa 462, 464, 210 N.W. 540, 541 (1926);Americus v. McGinnis, 128 Wash. 28,30,221 P. 987,988 (1924)

Heiskell v. Mozie, 65 App. D.C. 255,82 F.2d 861, 863 (1936).We think not. After dissolution, the stockholders of PSI were the real parties in interest upon all claims in favor of or against this corporation at the time of dissolution. Clark Estate Co. v. Gentry 362 Mo. 80,91 240 S.W. 2d124,130 (1951). Their interests in turn were subject to the liens of creditors. On the other hand, in legal proceedings aimed at winding up the former corporation's affairs, the interest of Fitzgerald as trustee is remedial in nature and premised upon procedural necessity The paucity of precedent notwithstanding, as Fitzgerald's status of "trustee" is intended to insure nothing more than the orderly administration of assets, he may not claim his statutory function includes the right to present argument pro se in the courts of this state. In this capacity he is representing the interest of others, and in judicial proceedings it is our opinion that he is engaged in the unauthorized practice of law. The anomaly of this situation gives rise to a constitutional infirmity wherein a stockholder or creditors property is subject to deprivation without him having his "day in court."[10] Basic requisites of "due process" guarantee that where property rights may be affected, notice and an opportunity to be heard must be afforded to all interested persons. [11]How than are these rights to be protected ? [12]

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[10] Weinacht v. Bower, 140 Or. 527, 533, 14 P.2d 622,625 (1932)

[11] Mortensen v. Empt Ret. Syst. Trustees, 52 Haw 212, 219-221, 473 P.2d 866,871-872 (1970);Territory v. Jennie L. Aona et al, 43 Haw 253, 255 (1959)

[12] In a derivative action a stockholder was permitted to appear pro se. Willheim v. Murchision, 206 F. Supp. 733 (S.D.N.Y. 1962) appeal dismissed, 312 D.2d 399 (2nd Cir. 1964). Under a similar statutory scheme, the right to assert or defend claims vests by law exclusively in the statutory liquidators of a dissolved corporation. Clark Estate Co v. Gentry Supra at 86-87, 240 S.W. .2d 124. However, a statutory liquidator

Ellis supra Decision

> "Because of the Constitutional dilemma presented, public policy dictates that an exception be made at this time to the prohibition against one engaging in the unauthorized practice of law. In the limited situation where the statutory liquidator makes a showing that corporate funds are unavailable for the hiring of counsel, he may perform the necessary legal services." Conclusion: "Again reiterating, the cornerstone upon which we provide this exception is the claim of insufficient assets."

Adapting Hawaii Justices legal logic, Fitzgerald relied also on ARS §§10-087(A)3, 10-105 Survival of Remedy After Dissolution statute to bring a pro se derivative action for PSI, (an almost mirror image of Ellis, supra PSI was dissolved, insolvent, and had property in the form of legal malpractice fraud claims worth millions of dollars. but, unlike Ellis supra, PSI's insolvency was directly caused by Respondent lawyers.)Fitzgerald as Trustee, also identified PSI legal malpractice /fraud claims were a 'property' of PSI see: Jones v. Siesennop, 371 N.E. 2d 895 Illinois(1977) quoted in part as follows;

> "....the court reviewed its previous constructions of the term 'personal property' and concluded whatever may be the distinction between a property right in its most general sense and real or personal property, we cannot consider property tangible merely because people usually thought of it that way in the 19th century. Such a rule of statutory construction would

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may be personally liable to a stockholder or creditors for breach of his duty to act with reasonable care and prudence in settling the corporate affairs. McClean v. Bradley, 282 F. 1011 (N.D.Ohio 1922) aff'd 299 F.2d 379 (6th cir 1924) cert denied 266 U.S. 619,45 S. Ct 98, 69 L. Ed 471 (1924); King v. Coosa Valley Mineral Products Co. 283 Alas 197215 So .2d 275 (1968); Megael Col V. Pierson, 99 N.J.Eq. 436, 132 A. 78 (1926)

lead to absurd consequences and would largely defeat the objective of the Survival Act in modern society. Broad terms like 'personal property' must be construed with reference to the conditions of present day life. The fact that particular forms of it were not in existence at the time of enactment, or were not specifically contemplated by the lawmakers, does not limit the application of the statute.

Legislative enactment's which are prospective in operation and phrased in terms comprehensive enough to include things of the same class subsequently coming into existence should be held applicable where such is consistent with the general legislative purpose. The word 'property' is a generic term and its meaning in any case must be determined by the sense in which it is used " The survival statute is remedial in nature and is to be liberally construed "McDaniel 34 Ill .2d at 492, 216 N.E. 2d 140. The reason for the rule of abatement was the common-law notion that a tort was originally regarded as punitive in character, whereas today damages for most torts are regarded as compensatory. Therefore " there is no reason why an estate that has been injured or depleted by the wrong of another should not be compensated whether the injured party is living or not." McDaniel supra. In McDaniel the court ruled in substance that an accrued cause of action wrongful death was personal property within the means of the survival statute, and survived the death of the plaintiff beneficiary. Simarily, there is no reason why an accrued action for professional negligence against an attorney should not also be construed as 'personal property' within the court's expanded definition."

C. Fitzgerald ,Trustee Pro Se, Filed A Derivative Law Suit For PSI & All Stockholders of Record [13]At Time Of Respondent's Malpractice/ Fraud Acts

PSI's stockholders wanted PSI reactivated.Fitzgerald's argument for pro se representation were Hawaii Justices U.S. Constitutional arguments in Ellis supra plus Illinois Justices arguments in Jones supra (legal malpractice claims are a property) and other legal authorities.

On August 14,1992 Trustee Fitzgerald filed a Derivative Complaint in Maricopa County Superior Court charging legal malpractice, Contract Tort and fraud. PSI's independent accountant provided the court with a sworn statement of PSI's insolvency / asset position and a portion of PSI's 1991 IRS tax return to substantiate insolvency. The trial judge struck these documents from the record and dismissed the complaint ruling 'no exceptional circumstances existed to warrant Fitzgerald to appear pro se in court. [14] A.R.S. §12-109 gives only the state supreme court jurisdiction over rules of court.

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[13] 18 CJS § 397 Corporations Pg. 734 "A state has wide powers in the regulation of derivative actions. In regulating such actions...under the principal of "maximization of good and elimination of evils"...."Within area of constitutionality, states should not be restrained from devising experiments, even those court might think dubious, in effort to preserve maximum good which equity sought in creating stockholder's derivative action, and at same time to eliminate as much as possible defects and evils"...; Cohen v. Beneficial Indus. Loan Corp., N. J., 69 S.Ct 1221 , 337 U.S. 541, 93 L.Ed. 1528.

[14] 18 CJS § 398 Corporations Pg. 736; "In well recognized classes of cases involving exceptional circumstances, on the actual or virtual refusal of the corporation to sue, an individual stockholder may, in equity, sue on behalf of himself and other stockholders and for the benefit of the corporation to enforce corporate rights or to redress a wrong which is primarily to the corporation."

Fitzgerald petitioned Arizona Supreme Court for Special action per Article 6, §5, (5).[15] Justice Zlaket, by phone conference suggested Fitzgerald should instead file the petition in Appeals Court which was done. Subsequently, On February 11, 1993, Arizona Appeal court ordered; "the court of appeals, in the exercise of its discretion, declines to accept jurisdiction in this special action."

Fitzgerald petitioned for Supreme Court review citing extra-ordinary exceptional circumstances why the petition should be granted; there was no previous Arizona decision controlling the point of law/rules in question ; the Supreme Court Rule regarding non lawyer representation of a corporation requires clarification / amplification in respect to Ellis supra & 7A C.J.S. Attorney & Client; No known conflicting opinion has been rendered on ELLIS in Arizona or elsewhere in the United States; the present case is the only known case involving a dissolved/ insolvent company as in Ellis. The Supreme Court denied review ignoring Jenkins v. First Baptist Church of Scottsdale App 1990,166 Ariz. 243 801 p.2d 478 Rev.Denied)

> " Arizona Supreme Court has authority to promulgate rules regulating pleading, practice, and procedure...that authority does not include power to

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15 In King v. Maricopa Superior Court(1983)Ariz.147, 673 P.2d 787 , (January 1993)"Special action relief was appropriate and discretion by Supreme Court to review minute entry dismissing client's complaint against attorney for legal malpractice was properly exercised, where client was acting pro se and was suing member of Arizona State Bar Association for malpractice arising out of previous attorney-client relationship, there was public interest in expeditious disposition of such matters, question presented was pure issue of law, and error by trial court in dismissing complaint was patent. A.R.S. Const Art. 6§5"

promulgate rules that abridge, enlarge, or modify substantive rights of a litigant."

Special action denied, Fitzgerald as trustee, on March 29,1993 in Arizona Appeal Court, Division One, filed an appeal from the Superior court order dismissing the complaint, again citing Ellis supra as his U.S. Constitutional right to prose due process. On December 22, 1993 an appeal court order dismissed Fitzgeralds Complaint on the basis Arizona rules of court do not allow a non attorney to represent a corporation.[16] On September 22,1994 Arizona's Supreme Court denied review.

D.Arizona BAR: Bayham Guilty Of Malpractice !

Fitzgerald had filed BAR malpractice charges against Bayham. Arizona's Supreme Court mandates Arizona BAR disciplinary actions are to be 'expedited' in the public interest.' Three + years after Bayham admitted guilt in his BAR response, a BAR discipline hearing committee (in part)confirmed these facts; Bayham lied to Fitzgerald; lied to the court; misled the Bar; falsified documents to the court; then attempted to produce substitutes (back dated) to cover his falsification. *ID at report page 6 (24), (25)*; for 10 months Bayham did not communicate with PSI / Fitzgerald requests for information re: his representation of PSI. *Id at report pg. 8 (31)*;abandoned PSI /Fitzgerald to prosecute another case etc.(all claims alleged in PSI's complaint).

BAR Discipline Committee Conclusions of law;

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[16] 19 C.J.S. CORPORATIONS § 862 at 517; "Statutes should be construed so as to give the corporation the power that is needed for the protection of the public interest and the rights of individuals who have had dealings with the corporation" See Blake v. Portsmouth & Concord R. Co., 39 N.H. 435 ...They have been liberally construed". See Helvering v. South Penn Oil Co., 68 F. 2d 420, 62 App. D.C. 373

1. Respondent violated ER 1.2(a) of Rule 42, Ariz. R.S.Ct by failing to abide by his client's decisions concerning the objectives of representation and failed to consult with his client as to the means by which they were to be pursued. Specifically, Respondent failed to discuss with his client their request to take the matter to trial immediately and failed to discuss the preparation and submission of the list of witnesses and exhibits

2. Respondent failed to act with reasonable diligence and promptness in representing his client in violation of ER 1.3. The comment to ER 1.3 of Rule 42 specifically states;

" Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so." Never once did Respondent contact his client to clarify whether the client-lawyer relationship still existed. The comment to ER 1.3 also states "A lawyer's workload should be controlled so that each matter can be handled adequately." Respondent failed to balance PSI's litigation with other matters being handled by Respondent at the same time.[17]

3. Respondent failed to adequately communicate with Mr. Fitzgerald, in violation of ER 1.4 (*Id at report pg. 8 (31)*.Clearly Respondent failed to keep his client reasonably informed about the status of his matter and failed to "promptly comply with reasonable requests for information" Bayham did not communicate with PSI/Fitzgerald requests for information re: his representation of PSI. *Id at pg. 8 (31)*.

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17 "Respondent (*Id at pg. 8 (31)* said he did not correspond with Fitzgerald after Oral Argument was heard on his Motion for Summary Judgment since he was preparing for trial in Zietlin v. Farmers Insurance". *(petitioner note ..... settled out of court)*

Committee Recomendations (adopted with no further review by Bar Commission or Az. Supreme Court); Respondent Bayham received an " informal reprimand" with costs of proceedings assessed against him, a lenient sanction not equal to ABA standards [18](and not published by the Az.BAR). Appointed BAR Council Cutler had expressed dismay at the light sanction proposed and suggested to BAR staff Council Cohen that an appeal should be made. Cohen said to ignore that as it would do not good, failing to tell Cutler if an appeal was not made, the BAR commission would not review the sanction (nor would the Arizona Supreme Court.)

E. Critical Information BAR Was Aware Of & Ignored ...This lawsuit & claim for damages !

Fitzgerald had made Bayham aware quick settlement was critical to PSI's survival as the hospital (being sued) was about to receive several million dollars from the sale of its old facility and had large debts so action had to be fast to put a claim against these funds. Bayham ignored Fitzgerald direction to make claims for damage and (unknown to PSI) abandoned PSI for another client. Bayham was aware PSI was a start up medical software company who's potential product was deemed a major break through by BUSINESS WEEK, Ernst & Young Medical Consulting Group and Apple Computer Inc.(with whom PSI had an interstate development contract) Apple Corporate executives projected PSI annual earnings to be multi-million dollars annualy. The

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18 "Standards for Imposing Lawyer Sanctions approved in February 1986 by the House of Delegates of the American Bar Association provid...."4.41 Disbarment is generally appropriate when (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client."

BAR had a copy of this complaint and media articles confirming the above. The BAR ignored them to reach a sanction. ABA/BNA lawyers manual on Professional conduct 301:131 Negligence And Breach Of Contract, Measure of Damages; " An attorney found guilty of malpractice is liable to an aggrieved client for the full extent of the loss inflicted. This means all damages that reasonably and foreseeable arise as a natural result of the attorneys malpractice. The rule is in harmony with the general law as to damages." [19]

REASONS FOR GRANTING THIS PETITION

I. Constitutional Conflict Between States Is Involved.

Arizona's Superior, Appeals and Supreme Court refused to acknowledge Petitioner Trustee's U.S. Constitution

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19 ABA/BNA Lawyers Manual on Professional Conduct 301:106 Malpractice .... " when compared to the standards used in judging other professions, where the problem is basically the same, the standards applied to attorneys seem barely to have advanced beyond their initial formulation in the 18th century. This disparity is well illustrated by comparing salient points of the law of medical malpractice with the law of legal malpractice.....only recently has it begun to be thought that an attorney who specializes would be held to a different standard of care than a general practitioner. The first case to squarely confront this issue was Wright v. Williams, 121 Cal Rptr 194, decided in California in 1975, which held that a lawyer specialist is to be judged by the standard of conduct of others practicing the same specialty. This decision may be a harbinger of a new trend although most courts have not been confronted with the issue and it remains to be seen whether they will go along with California's progressive view." ..... Amfac Distribution Corp. v. Miller 138 Ariz. 152 (1983) at (2,3) "This court has recently considered the accrual of the cause of action in medical malpractice cases , DeBoer v. Brown, 138 Ariz. 168 673 P.2d 912 (1983). There we held that, to state a cause of action, the plaintiff patient must have sustained some injury or damaging effect from the malpractice. We feel that the same is true in legal malpractice cases."

Due Process Rights (established in re Ellis supra.) The issue is important to establish uniform / equal application of Trustee Constitutional due process rights in all state / federal courts when legal malpractice claims are litigated by a trustee pro se for a dissolved / insolvent corporation under circumstances cited in Ellis and evident in this action.

II. To Not Allow A Unique Exception (As In Ellis) Is Not In The Best Public Interest .

Public opinion of lawyers is at an all time low[20] and will be even lower if this injustice is not remedied. If the Rule is not modified (as in Ellis) to allow Trustees to act pro se involving a dissolved insolvent corporation, it is reasonable to assume public perception will be lawyers rely on this rule of court (as in this instance) to escape corporate prosecution for corporate client malpractice claims. It is morally wrong to allow a lawyer to inflict mortal harm causing a company to become insolvent dissolved (dead) and then escape Trustee efforts equal to laws trustees utilize in bankruptcy.[21] to recover damages to re-active the company or compensate stockholders because the company has no money to hire a lawyer. Dissolved corporations do not have the powers of a

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20 *Richard K. Burke, professor law, University of Arkansas, Little Rock, 1984 law review article"....reproduced in NEWSWEEK November 4, 1991 pg. 1;* "For years we have" winked blinked and nodded" at blatant if not outrageous lying negotiating, investigating, testifying, and bargaining. In almost every aspect of our professional practice we have come to accept, in fact to expect, a certain amount of lying and deception .....Not only our code of ethics, but also many of our rules of evidence and procedure, frustrate and inhibit truth telling and truth finding and are largely responsible for the wholesale public condemnation that plagues us".

21 11 U.S.C. § 541, 117 U.S.C. §541 legal malpracitce claims are assigned to a trustee in bankruptcy.

viable corporation. For all intent and purposes they are ' dead' and thus are afforded special legal privileges in settling their affairs. To apply the same restriction (only a lawyer can represent a viable corporation in court) to a 'dead'corporation denies due process when , as in this case, Respondent lawyers caused PSI to not only be dissolved but also insolvent and therefore without funds to hire an attorney. There is suspicion the legal community sought to prevent Bayham from being found guilty of malpractice charges (or get a light sanction not made public) and / or prevent this law suit. Consider ;
First ; no malpractice lawyer would take the case,
Second; After long non action by the BAR, Fitzgerald contacted Chief Justice Feldman asking Supreme court intervention to enforce its mandate that disciplinary action is to be ' expedited'. Fitzgerald was informed the court could not intervene while a disciplinary action is in progress.That is ludicrous and not in the public interest.[22]
Third; No Arizona court would acknowledge 7A C.J.S. § 167 Attorney & Client or Ellis supra or rule on same.
Fourth ...The BAR misled appointed BAR council from challenging what he thought was a too lenient sanction. BAR staff council discouraged Cutler to not appeal not telling him the BAR commission and / or Supreme court could than not review the sanction (and BAR misconduct in the course of its handling of the case);
Lastly; Bayham was 'turned loose' to prey on an unsuspecting public. Consider Bayham's BAR Response: ["*id in discipline Committee report at (44)*]"

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[22]Justice Corcoran , Arizona Supreme Ct. , Arizona Republic , August 31, 1994 "The only way to assure the public's intersts are being served is by fullfilling our responsability for self regulation. We are charged with the responsibility for regulating ourselves and we, lawyers and judges, must act in a timely fashion "

It is my position that throughout the course of this case I represented PSI competently and in a professional manner." Than comes Arizona courts to deny Trustee Fitzgerald's Constitutional due process right and legal duty to protect PSI property and other claims (pro se) of PSI and its stockholders because PSI has no funds to hire a lawyer..thanks to the malpractice acts of Bayham. Public perception must be Bayham family influence (his sister is a commissioner in Maricopa superior court) and the legal profession shut Fitzgerald / PSI out from due process ....perhaps to avoid a precedent for others to similarly sue lawyers for malpractice. also consider ; Maricopa County superior court Chief Judge Rose on January 3, 1994 wrote;"To this judge's recollection, it has been the long standing adopted policy of this Bench that because judges in this county hearing cases in which a close family member of a judicial officer sitting in Maricopa County would, at a minimum, portray an appearance of impropriety, such cases are automatically assigned for hearing to an out of county judge."(not done in this suit). Public opinion that lawyers protect their own seems justified based on this case. It is imperative that this supreme court establish guidelines to allow the "unique exception" in Ellis supra and equally imperative this court send a message to lawyers that a ' rule of court ' will not shelter them from malpractice acts they commit that result in a company client becoming dissolved insolvent with related damages. A message to BAR associations and state supreme courts to not pass rules that restrict due process is also in order to protect the public.[23]

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[23] Ohio Appeal Judge Lawrence Grey, Arizona Republic, August 17, 1994. "No society can survive unless its legal system meets the people's reasonable expectations of justice and promotes and protects individual freedom and rights."

III. There is a conflict between Illinois and Arizona Supreme courts Re; Are Legal Malpractice claims A Corporate Property Under The Law.

Illinois' Supreme Court ruled they are. Arizona's Supreme Court refused to address the issue. Clarification is needed to prevent unreasonable Trustees due process delays in collecting Corporate malpractice Claims of Insolvent, Dissolved corporations.

CONCLUSION

The Petition For A Writ Of Certiorari should be granted for all reasons cited above.

Respectfully submitted :

JOHN LEZDEY
701 Haddon Ave.
Collingswood, N. J. 081098
(609) 858 2800
Counsel of Record for Petitioner

APPENDIX

1. *Maricopa County Superior Court Order of October 30, 1992*
Dismissed without prejucice

2. *Arizona Appeal's Court Order of December 22, 2993*
Dismissing Appeal

3. *Arizona Supreme Court Order of September 22,1994,*
review denied

4. *December 9, 1994*
Arizona Supreme Court , Chief Staff Attny Nelson
Refuses To Provide Certificate demanded in
Writ of Certiorari. (3.19, supreme court Practices :
(Jurisdiction to Review Decisions of State Courts.)

5. Arizona Bar Disciplinary Committee 6A Report

Appendix 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

October 30 ,1992 Honorable Brian R. Hauser

CV 92-14599

PHOENIX SYSTEMS
INTERNATIONAL ,INC .
Gordon Fitzgerald

Phoenix Systems
International Inc
8427Via Del Parque
Scottsdale,Az.85258

v.

ALAN PL BAYHAM, JR. , et al. Neal B. Thomas
John Oberg

The court does not find exceptional circumstances to exist in this case to warrant permitting Mr. Fitzgerald to act as a legal representative for Plaintiff.
Accordingly, IT IS ORDERED granting Defendants' Motion to Dismiss without prejudice.

Appendix 2

FILED Dec 22, 1993

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHOENIX SYSTEMS INTERNATIONAL INC,
an Arizona Corporation ; 1 CA-CV 93-0119
GORDON FITZGERALD,
STOCKHOLDER , STATUTORY DEPARTMENT M
TRUSTEE, LIQUIDATOR
Appellant,

v.

ALAN P. BAYHAM JR. et al MARICOPA County
Defendants-Appellees Superior Court
No. CV 92-14599

ORDER

Judges Philip E. Toci and Edward C. Voss have considered Gordon Fitzgerald's motion for substitution of real party in interest, appellees' response and motion to dismiss appeal , and appellant's reply.

A review of the record in this case indicates that this appeal was taken by Phoenix Systems International, Inc., an Arizona corporation. However, Gordon Fitzgerald, who purports to represent the corporation, is a non-attorney. It is well -established that corporations cannot appear in the State of Arizona through one who is not a licensed attorney. *Ramada Inns, Inc. v. Lane & Bird Advertising Inc.*, 102 Ariz. 127,426 P.2d 395 (1967). The notice of appeal by the corporation is ineffective because it is not signed by an attorney. No appeal was taken by Gordon Fitzgerald in his individual capacity.

IT IS ORDERED denying Gordon Fitzgerald's motion for substitution of real party in interest.

IT IS FURTHER ORDERED granting appellees' motion and dismissing this appeal.

DATED this 22nd day of December, 1993

_____/s /_____
PHILIP E. TOCI, Presiding Judge

Appendix 3

Supreme Court
State of Arizona

Filed September 28, 1994

Glen D. Clark , Clerk
September 22, 1994

RE: PHOENIX SYSTEMS INTERNATIONAL, INC. /GORDON FITZGERALD vs. ALAN P. BAYHAM JR. / DEBORAH BAYHAM/ROBERT BEUCLER et al.
Supreme Court No. CV-94-0059-PR
Court of Appeals No. 1 CA-CV 93-0119
Maricopa County No. CV 92-14599

GREETINGS;

The following action was taken by the Supreme Court of the State of Arizona on September 20, 1994, in regard to the above-referenced cause ;

ORDERED; Request for right to File Reply Based Upon New Arguments Made in Appellee's Response Brief =DENIED
FURTHER ORDERED: Request to Strike Portion of Petition for Review = GRANTED.
FURTHER ORDERED : Appellant's Petition for Supreme Court Review of Appeals Court Decision = DENIED
FURTHER ORDERED: Request for Attorneys' Fees or Sanctions = DENIED
Record returned to Court of Appeals, Division one, Phoenix, this 22nd day of September 1994.

NOEL K. DESSAINT, Clerk

Appendix 4

December 9, 1994

Arizona Supreme Court Refuses To Provide Certificate demanded in Writ of Certiorari. Re 3.19, supreme court Practices: Jurisdiction to Review Decisions of State Courts.)

Let the record show that a good faith effort was made to secure the above and the Arizona Supreme Court refused to provide same. Two attempts were made by petitioiner Fitzgerald to obtain the above from the Arizona Supreme Court. At 10:20 AM this date Fitzgerald spoke with Gary Nelson, Chief Staff Attorney for the Arizona Supreme Court who said that under no circumstances would the court provide such a document.Fitzgerald read the rule, verbatem, to Nelson. who said his court had never provided such a document , no lawyer had ever requested it, and Fitzgeald, pro se, will never get one !
Superior Court, Appeal's court and Arizona Supreme court records show Petitioner pleaded Constitutional rights to appear pro se as trustee for Phoenix Systems International,Inc.,based on U.S.Constitutional based arguments of Hawaii Supreme Court Justices in Re. Ellis 53 Hawaii, 23 p.2d 286 (1971), cert denied, 405 U.S., 1075,92 S.Ct.1500, 31 L.Ed2d 809(1972) that a trustee of a dissolved insolvent company without corporate funds to hire an attorney could act pro se to protect the property, claims of such a company and its stockholders.

Respectfully,

Gordon E. Fitzgerald , Director, Trustee Liquidator for
Phoenix Systems Internationial, Inc.
8427 Via Del Parque
Scottsdale, AZ. 85258

Appendix 5

Stephen M. Kemp, City Attorney
Office of the City Attorney
CITY OF PEORIA
8401 West Monroe, Room 340
Peoria, Arizona 85345
(602) 412-7043 (Facsimile)

FILED OCT 07 1994
State Bar of Arizona
by: Nicki l. Keesee

BEFORE THE STATE BAR OF ARIZONA
HEARING COMMITTEE 6 A

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,
ALAN PHILLIP BAYHAM JR.,
Respondent

No. 91-1625
Assigned to Hrg. Comm. 6A

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

This matter having come before Hearing Committee 6A and the State Bar of Arizona, through its bar counsel, and Respondent through his counsel having submitted Proposed Findings of Fact, Conclusions of Law and Recommendations as to sanction to be imposed. The hearing Committee makes the following findings of fact.

FINDINGS OF FACT

1. Respondent has been a member in good standing of the State Bar of Arizona since 1977.

2. Respondent has no prior disciplinary record.

3. On or about May 14, 1990, Respondent was retained by Gordon Fitzgerald for Phoenix Systems International (PSI) for litigation against Phoenix General Hospital and Medical

Center (PGH). Respondent agreed to represent PSI on a contingency fee basis and did not require a retainer from PSI.

4. On or about May 18, 1990, Respondent filed a complaint against PGH on behalf of PSI in Cause No. CV 90-14252, Maricopa County Superior Court alleging that PGH breached its licensing contract with PSI regarding use of certain computer software developed and marketed by PSI and seeking $70,000 in damages. *1

5. On or about June 29, 1990, Respondent filed a Motion for Summary Judgment on behalf of PSI in cause No. CV 90-14252, Maricopa County Superior Court.

6. On August 14, 1990, the Court heard cross Motions for Summary Judgment in PSIvPGH. During argument Judge Goodfarb indicated that he found a contract, an obligation and a breach by defendant PGH. The court indicated that it must deny PSI's Motion for Summary Judgment due to the existence of genuine issues of material fact raised by Defendant.

7. That Donald Peters, attorney for PGH testified that his client believed factual defenses existed in PSI v. PGH, with the likelihood that the matter could be contested.

8. Upon receipt of the Court's ruling on the Motion for Summary Judgment, Respondent asked Gordon Fitzgerald to provide an outline as to how he felt the case should be tried. At that time, Respondent advised Mr. Fitzgerald that he would seek a trial date.

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*1 Petitioner note . This is not correct. $70,000 was for balance due on contract , not damages

9. On or about August 30, 1990, Gordon Fitzgerald, CEO for PSI, mailed to Respondent a detailed analysis of how PSI thought the case should be pursued. This information listed evidence, lay and expert witnesses , and financial data. Further, Mr. Fitzgerald requested in said letter that Respondent call Mr. Frkovich of Ernst & Young as a witness during trial.

10. Subsequent to August 22, 1990, Respondent failed to communicate with Gordon Fitzgerald and PSI until he contacted Carol Robinson on or about June 21, 1991. This was despite repeated telephone calls and letters from Mr. Fitzgerald who requested communication from Respondent for information about his case.

11. On September 7, 1990, Gordon Fitzgerald sent a letter to Respondent advising him it was imperative that he obtain a court date as soon as possible and requested that Respondent advise him the following week of the court date. Respondent failed to respond to this letter.

12. On September 18, 1990, Mr. Fitzgerald again wrote a letter to Respondent referring to his August 20,1990 letter indicating that he made several attempts to reach Respondent by telephone with no response from Respondent Bayham. The letter also referred to Mr. Fitzgerald's letter of September 7th and also a telephone call to Respondent on September 14th, neither of which were answered by Respondent. The letter mentioned the fact that Respondent's secretary said that Respondent would return his call. However, Respondent failed to respond to Mr. Fitzgerald's telephone call and letters. Mr. Fitzgeralds letter requested

that Respondent write to him to let him know the trial date and procedures involved. Respondent failed to respond to this request.

13. On October 18, 1990, Gordon Fitzgerald wrote yet another letter to Respondent stating that his inability to understand why Respondent had still not responded to his many letters and telephone calls. In that letter Mr. Fitzgerald asked Respondent to contact him to advise him if he was still representing PSI and if not to advise him as to the procedure he should follow to get his case in court. Again Respondent completely failed to respond to this letter and communicate with his client.

14. Respondent suffered a disruption to his family with the moving into his household of his adolescent son from a prior marriage resulting in extensive counseling to Respondent and his family.

15 Respondent has acknowledged his failure to respond to PSI's correspondence.

16. On November 27, 1990, Mr. Fitzgerald wrote Respondent again, reminding him that he had no communication from Respondent for several months regarding his plans to try PSI's case and obtain a court date which Respondent said would be done before the end of 1990. In his letter, Mr. Fitzgeald notified Respondent that if he did not hear from him by December 10, in writing, regarding his plans to pursue the matter that he would conclude that Respondent elected to abandon his contractual obligations in representing PSI against PGH. Respondent

failed to communicate with his client by not responding to this letter as well.

17. In his letter of November 27,1990, Mr. Fitzgerald informed Respondent that the supplier of the hardware, Rick Mineweaser , had already won his case for summary judgment against PGH.

18. Respondent failed to confirm whether PSI desired the termination of his representation based on a concern that PSI could be left without counsel due to difficulty in finding another lawyer to take this case on a contingent fee.

19. Respondent suffered from illness during the spring of 1991 resulting in his being bedridden for a period of two weeks and subsequently impacting his performance.

20. Respondent, without the knowledge or consent of his client , filed a list of witnesses and exhibits on or about May 24, 1991.

21. On May 28, 1991 , Donald Peters, attorney for PGH, sent a hand delivered letter to Respondent stating that his request for production of documents had been ignored and that if he did not receive satisfactory responses within the next few business days, that he would be forced to file a Motion to Compel. Respondent failed to respond to this letter and to follow-up telephone call from Mr. Peters.

22. On June 13, 1991, Donald Peters , attorney for PGH, filed a Motion to Compel against PSI. In said motion , PGH alleged that almost a year earlier, on June 20, 1990, PGH served PSI with a short request for production of documents and a set of interrogatories, which had not been responded to

by Respondent. Further, Mr. Peters stated that Mr. Bayham did not respond to his letter or to his follow-up telephone call.

23. Respondent Bayham did not file a response to PGH's Motion to Compel.

24. On July 17, 1991, Judge Goodfarb granted PGH's Motion to Compel and ordered that Respondent Bayham pay PGH the sum of two hundred and fifty dollars. ($250). Judge Goodfarb entered an Order striking the Motion to Set filed in PSI's case and indicated by Minute Entry that no Motion to Set would be filed until Respondent complied with the discovery requests ordered.Thereafter, one week later, on July 24, 1991 Respondent sent a letter to Mr. Peters with a stipulation he prepared. In Respondent's stipulation he stated that the matters set forth in PGH's Motion to Compel were resolved shortly after the filing of the motion and that theMotion to Compel was to be withdrawn pursuant to the agreement of the parties prior to Judge Goodfarb awarding sanctions against Respondent Bayham.

25. Upon Receipt of Respondent's stipulation, on July 25, 1991, Mr. Peters faxed a letter to Respondent stating that the proposed stipulation troubled him. Mr. Peters reminded Respondent that he had still not completely complied with his discovery request. Mr. Peters refused to sign Respondent's stipulation stating that the matters had been resolved prior to Judge Goodfarb's issuing of sanctions, but instead drafted his own stipulation deleting the objectionable language. The second stipulation was filed on or about July 30, 1991.

26. On or about June 18, 1991, Respondent filed a Motion to Set and Certificate of Readiness in the PSI v. PGH lawsuit.

27. It was not until June 21, 1991, ten months after Respondent Bayham's last communication with his client, that Respondent called and spoke with Mr. Fitzgerald's daughter , Carol Robinson .*2 Mrs. Robinson advised Respondent that she was puzzled as to why he was calling since she was unaware that he was still representing PSI and further advised Respondent that he should not be contacting her but should be contacting Gordon Fitzgerald.

28. Respondent told Mrs. Robinson that he had been unable to contact Mr. Fitzgeald for the past ten months since his telephone number had changed.Mrs. Robinson advised Respondent that Mr. Fitzgerald's new telephone number was in the phone book and he had not moved in some twenty (20) years so that Respondent could have written him at the same mailing address. Mrs. Robinson gave Respondent Mr. Fitzgeralds new telephone number and Respondent advised here that he would call Mr. Fitgerald immediately. He did not.

29. On June 28, 1991, Mr. Fitzgerald sent a certified letter to Respondent indicating that Carol Robinson told him that Respondent would be contacting him and to date he had still not done so. Further, Mr. Fitzgerald advised Respondent Bayham that his last communication with him was in November of 1990 and that if he did not communicate with him in writing by December of 1990 that this would indicate that Respondent had abandoned PSI's case.

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*2 Petitioners note .. Robinson is a young nurse stockholder co founder of PSI and a stockholder at time malpractice acts were committed.

30. On July 5, 1991, Mr. Fitzgerald sent another letter by certified mail to Respondent. In said letter Mr. Fitzgerald complained that Respondent filed a Motion to Set without consulting him and that he failed to mail him a copy of the Motion to Set for nearly two weeks.

31. Respondent finally responded to his client *3 in writing by letter dated July 9, 1991. In said letter he admitted that he knew that the matter could have been scheduled for trial faster. Respondent further attempted to excuse his total lack of communication by explaining that he attempted to contact Mr. Fitzgeald by telephone but that his telephone was disconnected and there was no forwarding number indicated. He advised that he spoke with Mr. Fitzgerald's daughter because he was unable to contact him by telephone.

32. That PGH offered a settlement of $30,000 to PSI in July 1991 and that PSI responded with a counter offer of $60,000 to PGH.

33. Mr. Fitzgerald indicated that he believes he was compelled to settle his case for less than he felt he was entitled .

34 That PSI v. PGH was ultimately settled by the parties for $55,000 in August, 1991 and that PGH indicted that a settlement prior to this date was unlikely due to lack of available funds.

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*3 Petitioner note. Bayhams letter also stated "at this point Gordon I sense that you are dissatisfied with my representation of your interests in this matter. I therefore believe that if you wish to retain another attorney to continue this matter feel free to do so " Fitzgerald/PSI was no longer a client of Bayham by virtue of Bayham purposely not having answered the demand letter that cited if Bayham did not respond it would mean he abandoned PSI representation therefore Bayham could not dictate to him.

35. That no facts have been presented to demonstrate that as a result of Respondent's conduct in this matter the settlement amount was reduced by PGH to the disadvantage of PSI.*4

36 Respondent sent a letter to David Dow dated August 21, 1991 indicating "I have never withdrawn from the case and have never been informed by Mr. Fitzgerald that I am not his attorney on this matter."

37 Respondent's actions show a lack of communication with his client over the ten-month period.

38. Respondent admitted that he ignored representation of his client PSI for other clients. In Respondent's letter to the state Bar of November 4, 1991, Respondent stated that he did not correspond with Mr. Fitzgerald after Oral Argument was heard on his Motion for Summary Judgment since he was preparing for trial in Zielin v. Farmers Insurance.*5 Respondent also indicated that he had a number of other matters which required his attention prior to PSI's matter.

39. Respondent did not forward copies of the pertinent documents to PSI shortly after they were either generated by him or received by him. Minute entries and other documents were sent to Mr. Fitzgerald weeks after they were generated

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*4 Petitioner note: Not true! Fitzgerald prior requests to Bayham to add $250,000 damages to the PGH complaint were ignored by Bayham. PGH Settlement was for partial damages only with no payment received on the $70,000 balance owed on the contract. Fitzgerald had to negotiate at extreme disadvantage due to Bayham negligence and was told by another attorney to settle for what he could get 'at once' (PGH claimed near bankruptcy) and sue Bayham for legal malpractice to recover damages. PSI was forced into dissolution / insolvency by Bayham negligence and lost the company, facts testified to before the committee (who hada copy of this lawsuit) but totally ignored Fitzgerald / PSI loses.

*5 Petitioner note: Settled out of court.

and Judge Goodfarb's Minute Entry ordering sanctions had not been delivered to Mr. Fitzgerald until much later.

40. Respondent indicated that he believes that his client's complaint was simply an effort to avoid payment of his attorney's fees.

41. Respondent did not receive any fees from Fitzgerald in this subject matter.

42. In his letter of January 3, 1992 , Respondent mislead the State Bar by stating "I had regular and frequent communication with Fitzgerald throughout the course of the litigation."

43. Respondent in his January 3, 1992 letter to the State Bar admitted that he did not advise his client until July 24, 1991 of the Motion to Compel which had been filed back on June 13, 1991.

44. Respondent failed to admit wrongdoing by stating in his January 3rd letter to the State Bar, "It is my position that throughout the course of this case I represented PSI competently and in a professional manner. "

45. Respondent did cooperate with the State Bar in responding to the allegations.

46. Respondent's conduct in this matter was isolated to this particular case.

CONCLUSIONS OF LAW

1. Respondent violated ER 1.2(a) of Rule 42, Ariz. R.S.Ct. by failing to abide by his client's decisions concerning the objectives of representation and failed to consult with his client as to the means by which they were to be pursued. Specifically, Respondent failed to discuss with his client their

request to take the matter to trial immediately and failed to discuss the preparation and submission of the list of witnesses and exhibits.

2. Respondent failed to act with reasonable diligence and promptness in representing his client in violation of ER 1.3. The comment to ER 1.3 of Rule 42 specifically states :

"Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. "

Never once did Respondent contact his client to clarify whether the client-lawyer relationship still existed.

The comment to ER 1.3 also states " A lawyer's workload should be controlled so that each matter can be handled adequately."Respondent failed to balance PSI's litigation with other matters being handled by Respondent at the same time.

3. Respondent failed to adequately communicate with Mr. Fitzgerald , in violation of ER 1.4. Clearly Respondent failed to keep his client reasonably informed about the status of his matter and failed to "promptly" comply with reasonable requests for information."

4. That the Hearing Committee has reviewed the matter for Aggravating and Mitigating facts and finds the following ;

Aggravating Facts

a. Substantial experience in the practice of law.

b. Refusal to acknowledge wrongful nature of conduct.

Mitigating Facts.

a. Personal or emotional problems

b. Physical or mental disability or impairment

c. Absence of prior disciplinary record.

Recommendations

1. The Hearing Committee reviewing the entire record unanimously recommends ;

a. That the Respondent be informally reprimanded

b. That the costs of these proceedings shall be assessed against Respondent in accordance with Rule 53 (e)(3) Rules of the Supreme Court of Arizona.

RESPECTFULLY SUBMITTED this 4th day of October 1994.*6

_____/s/ _____
Stephen M. Kemp Chairman
Hearing Committee 6 A

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*6 Fitzgerald received this report from a BAR staff member after BAR appointed counsel Cutler told Fitzgerald to go to the BAR to obtain same. This'un appealed' report was not reviewed by a BAR commission or Arizona Supreme Court. Recomendations were adopted totally by the BAR in its final order. To Fitzgeralds knowlege an order never published in violation of supreme court Bar filing rules. The public, uninformed, is at risk of Bayham who said he did nothing wrong.